IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 804

EUGENE DIETZGEN CO.,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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APPENDIX.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioner, Eugene Dietzgen Co., a Delaware corporation, respectfully prays for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Seventh Circuit entered May 22, 1944, modifying, approving and affirming a cease and desist order of the Federal Trade Commission issued against petitioner and others on August 25, 1941, upon a complaint instituted by it on March 29, 1937.

The petitioner, a Delaware corporation having its factory and principal offices in Chicago, Illinois, and within the Seventh Circuit, invoked the jurisdiction of the United States Circuit Court of Appeals for said Circuit by filing

therein on September 22, 1941 its petition to review said cease and desist order pursuant to the provisions of Section 5(c) of the Federal Trade Commission Act. (Chapter 311, Sec. 5, 38 Stat. 717, 719; Sec. 45 Title 15, U. S. C. A.)

On February 29, 1944, said Circuit Court rendered an opinion by Evans, Circuit Judge (reported 142 F. (2d) 321), confirming said cease and desist order, a copy of which said opinion is set forth in the appendix hereto. On March 14, 1944, petitioner filed its petition for rehearing, which was denied by said Court on May 3, 1944. Said Circuit Court on the same day rendered a supplemental opinion (unreported), a copy of which is set forth in the appendix hereto. On May 22, 1944, said Circuit Court entered its final decree substantially the same as the cease and desist order of the Commission (R. 1016).

BASIS FOR THE JURISDICTION OF THIS COURT TO REVIEW THE JUDGMENT IN QUESTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of Congress of February 13, 1925 (U. S. C. A., Sec. 347).

Said decree of the Circuit Court is subject to review by this Court upon certiorari, as provided in Section 347 of Title 28 U. S. C. A. (Sec. 45(g), Title XV U. S. C. A.)

This petition is filed within the time provided by Section 350 of Title 28, U. S. C. A.

SUMMARY OF THE MATTER INVOLVED.

On March 29, 1937, the Federal Trade Commission instituted a complaint against Scientific Apparatus Makers of America (hereinafter sometimes referred to as "SAMA"), its officers and directors, Surveying-Drafting-Coaters Section (hereinafter sometimes referred to as "SDC Section") of the Scientific Apparatus Makers of America, an association, its officers and certain members, separately and as representatives of the other members, purporting to be pursuant to the provisions of the Act of Congress, approved September 26, 1914 entitled "An Act to Create a Federal Trade Commission, to Define its Powers and Duties, and for Other Purposes." The complaint charged that the corporations, the association and the individuals therein described named as respondents, have been and now are using unfair methods of competition in commerce as "commerce" is defined in said Act (R. 1, 2).

The complaint was instituted prior to the amendment of March 21, 1938, which added the words "and unfair or deceptive acts or practices in commerce," but no attempt was made by amendment or otherwise to bring the case within the terms of said amendment to the statute.

The Act prior to said amendment read: "Unfair methods of competition in commerce, are hereby declared unlawful," and this case is controlled by the provisions of the Act as they existed prior to said amendment.

The complaint charged (Par. Seven, R. 6, 7) that:

> "Prior to the formation of the respondent association member respondents Charles Bruning Company, Inc., The Huey Company, The Frederick Post Company, Eugene Dietzgen Company, Inc., and other members of the industry, on or about July 15, 1932, entered

into and thereafter carried out an understanding, agreement, combination and conspiracy for the purpose and with the effect of restricting, restraining, and monopolizing, and eliminating competition in, the sale of blue print paper, and others of the products hereinabove mentioned, in trade and commerce between and among the several states of the United States and in the District of Columbia."

It further charged (Par. Eight, R. 7), that:

"Pursuant to said understanding, agreement, combination and conspiracy, and in furtherance thereof, the said member respondents Charles Bruning Company, Inc., The Huey Company, The Frederick Post Company, Eugene Dietzgen Company, Inc., and the other members of the industry parties thereto, have done and performed and still do and perform the following acts and things:

"1. Agreed to fix and maintain and have fixed and maintained the prices at which said products are sold.

"2. Agreed to fix and maintain and have fixed and maintained uniform terms and conditions for all sales made, including, but without limitation, classification of customers, freight allowances, duration of and optional clauses in contracts.

"3. Agreed to induce and have, through threats, coercion and persuasion, induced members of the industry, not parties to said understanding, agreement, combination and conspiracy, to participate in and cooperate with the parties thereto in carrying out said understanding, agreement, combination and conspiracy.

"4. Agreed to require and have required dealers purchasing said products for resale to consumers to maintain the prices fixed and agreed upon by the respondents.

"5. Agreed to submit and have submitted uniform and identical bids on said products when requests were made for such bids.

"6. Agreed to and have interfered with the source of supply of raw paper of certain members of the industry who did not adhere to the schedule of prices fixed and agreed upon by the said respondents."

It further charged (Par. Nine, R. 7, 8, 9) that:

"Subsequent to the entering into and carrying out of the aforementioned understanding, agreement, combination and conspiracy by the parties thereto, the respondent association was formed by the respondents Scientific Apparatus Makers of America and the member respondents and thereafter, and on or about the 3rd day of June, 1935 and on divers days and dates thereafter, the said respondents entered into and thereafter carried out understandings, agreements, combinations and conspiracies for the purpose and with the effect of restricting, restraining and monopolizing, and eliminating competition in, the sale of blue print paper and the other products described in paragraph three hereof in trade and commerce between and among the several states of the United States and in the District of Columbia. Pursuant to said subsequent understandings, agreements, combinations and conspiracies and in furtherance thereof the said respondents have done and performed and still do and perform the acts and things done and performed pursuant to the understanding, agreement, combination and conspiracy mentioned in Paragraph Eight hereof and do and perform in addition thereto the following acts and things:

"1. Each of the members of the respondent association agreed to and does file with the respondent association a schedule of the prices, including discounts and the terms and conditions of all sales, at which such members will and does sell said products.

"2. Each of said members of respondent association agreed that the prices filed by the respective members could be deviated from only under certain conditions, but agreed that under those conditions they would not and they do not sell at a price less, a discount greater, or on more favorable terms and condi-

tions than those granted by the terms of the price list filed by any other member respondent showing the lowest price, the greatest discount and the most favorable terms of sale.

"3. The respondent association collects from and disseminates among the member respondents information as to prices, discounts and the terms and conditions of sales which enables each of said member respondents to know what prices will be charged by all of the other member respondents. Said member respondents exchange information among themselves in regard to the price discounts and terms and conditions of sale to be submitted by such members when bids are requested.

"4. In many instances the respondents declare the bids requested by purchasers to be 'open,' because some member of the industry bidding in such instances is not a participant in the carrying out of said understandings, agreements, combinations and conspiracies and is selling the products of the industry at prices less than those fixed by the member respondents, and in such cases the member respondents collusively submit identical bids at prices lower than those that would be otherwise submitted so as to prevent such non-participating member of the industry from securing any substantial amount of business and to compel such member to become a party to said understandings, agreements, combinations and conspiracies.

"5. Said member respondents and the respondent association have adopted and agreed upon detailed rules and regulations designed and intended to prevent any deviation on the part of the member respondents from the price fixed and agreed upon as hereinabove alleged.

"6. Said respondents used and are using other methods and means designed to suppress and prevent competition and restrict and restrain the sale of said products in said commerce."

It further charged (Par. Eleven, R. 9) that:

> "Said understandings, agreements, combinations and conspiracies, and the things done thereunder and pursuant thereto, as hereinabove alleged, have had and do have the effect of unduly and unlawfully restricting and restraining trade and commerce in said products between and among the several states of the United States and in the District of Columbia; of substantially enhancing prices to the consuming public and maintaining prices at artificial levels and otherwise depriving the public of the benefits that would flow from normal competition among and between the member respondents; of eliminating competition, with the tendency and capacity of creating a monopoly in the sale of said products in said commerce."

The complaint then alleges as a legal conclusion, that:

> "Said understandings, agreements, combinations and conspiracies, and the things done thereunder and pursuant thereto, and in furtherance thereof, as above alleged, constitute unfair methods of competition within the intent and meaning of an Act of Congress, approved September 26, 1914, entitled 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' and are to the prejudice of the public." (R. 9, 10.)

No other acts constituting unfair methods of competition in commerce were charged in the complaint. The complaint did not allege the existence, at the time of filing the complaint, of actual or potential competitors of petitioner, or that any member of the industry or his business had been injured or injuriously affected by the acts and conduct of petitioner and other respondents, and no proof was offered as to these matters. In fact, the complaint charged in substance that all competition had been eliminated (Par. Six. R. 5), and the Commission expressly so found (Findings of Fact, Par. 11, R. 819).

SEPARATE ANSWER OF EUGENE DIETZGEN CO. TO SAID COMPLAINT.

On June 15, 1937, the petitioner, Eugene Dietzgen Co., filed its separate answer (R. 12-26) denying all of the material allegations of said complaint, and alleging in substance that it became a member of the Scientific Apparatus Makers Association and the Surveying-Drafting-Coaters Section after the adoption of the National Industrial Recovery Act, upon the invitation of said Association to do so for the purpose of joining with it in applying for and presenting to the President a code of fair competition as authorized by that Act (R. 13); that on or about August 1, 1933, the Association submitted to the President a Code of Fair Competition, and after a hearing before the Administrator the President, by Executive Order, on November 14, 1933, approved the Code (R. 19); that the Manager of the SDC Section required each member of said Section to file a statement of sales policy, including prices, discounts and conditions of sale; that thereafter, on or about March 3, 1934, it filed its list prices, discounts and terms of sale to buyers of blue print paper and cloth and brown print paper and cloth, and on March 14, 1934, filed its list prices, discounts and terms of sale to buyers of drafting room furniture (R. 21), and that the same were approved by the Administrator; that these list prices, discounts and terms of sale were the same or substantially the same as it had established, published and distributed long prior to the adoption and approval of the Code (R. 22, 24, 25).

It alleged that it has never at any time, directly or indirectly, used or engaged in any unfair method of competition in commerce, and is not now engaging in any unfair method of competition in commerce, and that the matters and things alleged in said complaint do not constitute un-

fair methods of competition in commerce (R. 24); that the prices, discounts, terms and conditions of sale filed with the Manager were substantially the same as those published and distributed to its patrons and customers in 1922 during an economic and financial depression in the industry; that the costs of production of said articles have materially increased since 1933, but respondent has at no time increased its prices (R. 25, 26).

Certain Facts Stipulated.

On June 10, 1938, the Commission appointed an Examiner to take evidence. Upon the hearing of evidence before the Examiner petitioner entered into a stipulation as to certain of the facts (R. 133-43). It was stipulated that, subsequent to June 16, 1933 (which was also the date of the enactment of the National Industrial Recovery Act), the SAMA increased its membership, divided its members into sections, (R. 134) and the respondents before the Commission were invited to and did become members for the purpose of joining with said SAMA in applying for and presenting to the President of the United States, through the National Recovery Administration, a Code of Fair Competition for the scientific apparatus industry (R. 135, 136, 137); that on or about August 1, 1933, pursuant to the provisions of said Act, said Association, on behalf of its members, applied for and submitted to the President of the United States a Code of Fair Competition for the scientific apparatus makers industry; that after consideration and hearings thereon, the Administrator made his report to the President, who approved said report and by executive order a Code of Fair Competition for the Scientific Apparatus Industry (R. 136, 137).

> "20. That all the provisions of said Code and Amended Code applied to and governed the conduct of the business of those engaged in producing, selling,

and distributing the products specified therein; and all the members of the industry engaged in said business were by law required to comply with said Code and/or with supplementary Codes containing special provisions pertaining solely to certain Sections, which supplementary Codes were duly approved by said Administrator; and the Eugene Dietzgen Company, did comply with all of the Code provisions, applicable to it." (R. 138.)

"26. That herein filed made a part of the record is a schedule showing the list prices of the principal widths and grades of blue print paper of the Eugene Dietzgen Company prior to, during, and after the termination of the National Industrial Recovery Act, together with the actual selling prices of said products to various classes of purchasers, which is identified and received in evidence as COMMISSION'S EXHIBIT No. 5. *No changes have been made in Eugene Dietzgen Company's prices since the termination of the National Industrial Recovery Act.*" (R. 140.) (Italics supplied.)

"28. That on or about May 27, 1935, the Supreme Court of the United States held that the provisions of the National Industrial Recovery Act, authorizing the President of the United States to issue and promulgate Codes of Fair Competition, were unconstitutional, and shortly thereafter the President of the United States made public request to all members of Codes of Fair Competition theretofore approved by him or by the said Administrator. Herein filed and made a part of the record is a copy of a press report showing said request, which is identified and received in evidence as COMMISSION'S EXHIBIT No. 6." (R. 141.)

In Exhibit 6, the President of the United States made public request of all members of industries subject to codes of fair competition theretofore approved by him, for their continued and voluntary observance of the provisions of said codes.

Donald Richberg, General Counsel and Chairman of the Board of National Recovery Administration, also suggested voluntary code observance (R. 324, 326, 327). Major Berry, who was a Division Administrator of the NRA, arranged a conference for all industries operating under codes, which was held in Washington. At said conference the matter of voluntary code observance was discussed, as well as rewriting the codes for the purpose of clarification (R. 324, 326, 327).

Prior to the date of this Court's decision above mentioned, SAMA had given notice to its members of the annual meeting thereof to be held in Atlantic City, New Jersey, beginning on June 3, 1935. The members of the SDC Section held a meeting at the same time, and the members of SAMA and the members of the SDC Section at their respective meetings gave consideration to the request of the President for continuing voluntary observance of codes by members of industries subject to their provisions (Ex. 6, R. 141; Roberts, R. 324, 325, 326, 327).

At the meeting of the members of the SDC Section there was a full discussion of the situation and the members voted to continue code observance, except as to paragraph 12 of the Supplementary Code identified in the record as Commission's Exhibit 4. Said paragraph related to price filing and provided that a member should not sell his product lower than his filed prices, except to meet some lower price filed by other members. As to said paragraph 12 it was voted to refer the matter to the executive committee of the Section for re-writing in legal form and subsequent submission to the Section (Stip. Par. 29, R. 141-142).

As a result of the activities of SAMA and the SDC Section, taken at the request of the President and other representatives of the Government, SAMA submitted to all

of its members, through its various sections, a proposed code for the industry which has been identified and received in evidence as Commission's Exhibit 8 (Stip. Par. 30, R. 142).

The proposed code was submitted to the members for their action, criticisms and suggestions (Roberts, R. 327).

The proposed code, Exhibit 8, was by the board of directors of SAMA sent to the members of the SDC Section and was fully discussed at a meeting of the Section held at Cleveland on October 29, 1935. Certain modifications or changes were proposed as shown in Exhibit 9, and as so changed the Section gave a vote approving the recommendation thereof as satisfactory to the Section (Stip. Par. 30, R. 142, Ex. 9).

Parker, Secretary and Manager of the Section, testified that the matter of a code was in tentative form and the members (of the Section) present were simply trying to state to the Board of Directors of the SAMA what would be a satisfactory code for the Section and were not entering into an agreement at that time (R. 554).

Exhibit 10 is a copy of the minutes of the meeting of the Section, held at Cleveland on October 29, 1935.

The proposed code as amended and as so recommended and approved by the SDC Section as satisfactory to it, has been received in evidence and is identified in the record as Exhibit 9 (Stip. Par. 30, R. 142).

At a meeting of the members of the SDC Section held at Chicago on June 1, 1936 (Ex. 11, Minutes of Meeting; Stip. Par. 31, R. 143, 144) certain rules of fair competition identified and received in evidence as Exhibit 11-A were approved as satisfactory to said Section (Stip. Par. 31, R. 143, 144).

The practices designated unfair and as destructive of

the industry as set forth in Section 3 of Article II of and Exhibit 11-A were prepared, submitted and recommended by Mr. Arthur Fisher, who was then attorney for SAMA (Parker, R. 551, 552). At least Sub-section 3.1 of Section 3 of Article II of Exhibit 11-A was recommended by Mr. Fisher. It is the one relating to selling and price filing (Parker, R. 551, 552; Keller, R. 501, 502).

Sub-section 3.1 aforesaid was a modification of paragraph 12 of the Supplementary Code (Exhibit 4) which was abandoned at the Atlantic City meeting of June 3, 1935 with directions to the executive committee to revamp or reform the same and as so reformed or modified to be submitted at a meeting of the SDC Section. The meeting in Chicago on June 1, 1936 was the first meeting at which the modification of paragraph 12 of the Supplementary Code (Exhibit 4) was submitted for the consideration of the Section and it was approved in the form of Sub-section 3.1 of Section 3 of Article II of Exhibit 11-A. Exhibit 11-A was never approved by the board of directors of SAMA (Stip. Par. 31, R. 142, 143). This statement is also confirmed by Mr. Roberts, the president of SAMA (R. 348).

Petitioner Resigned From SAMA and SDC Section March 4, 1938.

On March 4, 1938, nearly three and a half years before the Commission made its findings of fact and entered its cease and desist order, the petitioner resigned as a member of Scientific Apparatus Makers of America and as a member of Surveying-Drafting-Coaters Section (Par. 8, Examiner's Revised Report, R. 770).

McDonald Testimony.

In the course of the hearing before the Examiner, counsel for the Commission called as a witness one McDonald, who was an investigating agent of the Commission and who had been authorized to make an investigation for information that might show violations of the Federal Trade Commission Act or for information or documents that might show no violations thereof (R. 458). Petitioner objected to his testimony, and also to said exhibits which he had obtained from the files of other respondents and moved to strike the same from the record. Upon cross-examination it appeared that at the time the witness McDonald obtained the papers and documents included in Exhibits 155 to 159 inclusive, he also obtained other correspondence and documents bearing on the nature of his investigation which he had delivered to the Commission and which were then in its possession (R. 459).

Counsel for petitioner called upon counsel for the Commission to produce such additional documents as the witness had obtained from said files, which counsel for the Commission refused to do. Upon the refusal of the witness, as well as counsel, to produce the additional documents obtained by the witness, the motion to strike said exhibits was again renewed (R. 459). The Commission later overruled petitioner's written motion to strike the exhibits in question, which was based upon the ground that the Commission was withholding evidence favorable to petitioner and other respondents and which the attorney for the Commission declined to produce, without giving petitioner an opportunity for argument on said written motion (R. 97-102).

It further appeared that these favorable documents, or copies thereof, were not available to any of the respondents

because they had been taken from the files of certain of the respondents and no copies thereof remained in their said files (R. 451-57, 298, 313, 314, 315).

Motions by Petitioner.

On December 1, 1939, the petitioner, Eugene Dietzgen Co., made a motion before the Commission to strike from the record all testimony offered by the Commission alleging, among other things, that the charges in the complaint, if true, would constitute understandings, agreements, combinations and conspiracies in violation of the Sherman Act, fully completed and existing at the time of the institution and service of the complaint; that the Commission is an administrative body without jurisdiction to consider, pass upon or determine violations of the Sherman Act, or to enforce or administer its provisions (R. 97-102).

On the same day (December 1, 1939) petitioner moved to enter an order of dismissal for the reason that the Commission has no power or jurisdiction to institute a complaint against or to determine the existence of any agreement, understanding, combination or conspiracy in restraint of trade, in violation of the anti-trust laws; that the complaint does not charge those respondents with the doing of acts that constitute unfair methods of competition in violation of the Federal Trade Commission Act (R. 102-103).

On December 12, 1939, said motions to strike and to dismiss were denied by the Commission (R. 104-105).

Further Proceedings.

At the conclusion of the hearing before the Examiner he made a report (R. 660-678) to which petitioner filed exceptions (R. 678-708).

The Examiner then made a revised and supplemental report (R. 767-785), to which petitioner filed exceptions (R. 786-789).

On August 25, 1941, the Commission made findings of fact (R. 811-825) and entered a cease and desist order (R. 826-829).

The Federal Trade Commission dismissed the complaint as to the Scientific Apparatus Makers of America. Petitioner then filed, in the Circuit Court of Appeals for the Seventh Circuit, its petition for review (R. 830-849), together with its statement of points (R. 850-860).

On November 19, 1941, petitioner filed an amendment to its petition for review (R. 861-865) and an amendment to its statement of points (R. 866-870).

Certain Charges in Complaint Not Sustained by Commission.

Neither the Examiner in his report or revised report, nor the Commission in its findings of fact, made any findings sustaining the following charges in the complaint:

(1) That any of said respondents used any threats or coercion;

(2) That they agreed to require, and have required dealers purchasing said products for resale to consumers to maintain prices fixed and agreed upon by the respondents;

(3) That they agreed to and have interfered with the source of supply of raw paper of certain members of the industry who did not adhere to the schedule of prices fixed and agreed upon by said respondents;

(4) That "In many instances the respondents declare the bids requested by purchasers to be 'open', because some

member of the industry bidding in such instances is not a participant in the carrying out of said understandings, agreements, combinations and conspiracies and is selling the products of the industry at prices less than those fixed by the member respondents, and in such cases the member respondents collusively submit identical bids at prices lower than those that would be otherwise submitted so as to prevent such non-participating member of the industry from securing any substantial amount of business and to compel such member to become a party to said understandings, agreements, combinations and conspiracies" (R. 815-825).

(5) "Said member respondents exchange information among themselves in regard to the price discounts and terms and conditions of sale to be submitted by such members when bids are requested."

(6) "Said respondents used and are using other methods and means designed to suppress and prevent competition and restrict and restrain the sale of said products in said commerce."

QUESTIONS PRESENTED.

1. Whether the Commission had jurisdiction to proceed under said complaint and to make a valid cease and desist order thereon.

2. Whether the complaint alleged facts constituting unfair methods of competition in commerce within the meaning of Section 5 of the Federal Trade Commission Act.

3. Whether the Federal Trade Commission has jurisdiction and power under the Federal Trade Commission Act,

(a) To file a complaint alleging the existence and continuance of complete understandings, agreements, combinations and conspiracies in restraint of trade in commerce, the elimination of competition, and the creation of monopoly, which allegations, if true, would constitute violations of the civil and criminal provisions of the Sherman Act (R. 5, 6, 8);

(b) To hear and determine the existence and continuance of said complete understandings, agreements, combinations and conspiracies in restraint of trade in commerce, resulting in the elimination of competition and the creation of a monopoly constituting violations of the Sherman Act, which would require the exercise by this administrative body of complete judicial power;

(c) After the determination of the matters set forth in sub-paragraph (b) above, to then declare by fiat that said matters constitute unfair methods of competion in violation of the Federal Trade Commission Act (R. 825);

(d) Upon said determination and declaration, to then enter an order in complete injunctive form restraining petitioner and other respondents before the Commission from carrying out said agreements, understandings, combinations and conspiracies, and from doing in furtherance thereof any of the acts and things

specified in said order (R. 827, 828, 829, 1016, 1017, 1018);

(e) To exercise the jurisdiction and power to restrain full, complete and existing violations of the Sherman Act, which vests exclusive jurisdiction and power in the district courts to enjoin such violations of said Act (R. 827, 828, 829, 1016, 1017, 1018).

4. Whether the Commission had power or jurisdiction to make the cease and desist order in the absence of any evidence in the record to show that any competitors of petitioner, actual or potential, or their business, were in any manner injured or their business injuriously affected by any act or acts of the petitioner.

5. Whether the Commission had power or jurisdiction to make the cease and desist order because the same, and its findings of fact, are not supported by lawful evidence and are contrary to the undisputed evidence of record before the Commission.

6. Whether the acts of the petitioner subsequent to the decision of this Honorable Court in *Shechter Poultry Corporation* v. *United States*, 295 U. S. 495, pursuant to the request of the President of the United States that the parties continue voluntarily to observe said Codes, in continuing to adhere to its prices and discounts which it had theretofore filed with the Code Administrator as required by the provisions of the National Industrial Recovery Act, constituted a violation of the Sherman Anti-Trust Act.

7. Whether Section 4(a) (Appendix p. 19) of the National Industrial Recovery Act (48 Stat., Ch. 90, 195) authorized the President to make the request (Exhibit 6) to members of all industries having codes to continue voluntary observance thereof, and if so, whether the petitioner and other members of the industry, in complying with said request, violated the provisions of the Sherman Act.

8. Whether the acts of the petitioner subsequent to the decision of this Court in *Shechter Poultry Corporation* v. *United States*, 295 U. S. 495, in continuing to adhere to its prices and discounts which it had theretofore filed with the Code Administrator under and pursuant to the provisions of the National Industrial Recovery Act, constituted an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act.

9. Whether the provisions of Section 3.1 of Article II of the "Rules of Fair Competition" for the SDC Section (Exhibit 11a) constitute a violation of the Sherman Act, or an unfair method of competition contrary to the provisions of Section 5 of the Federal Trade Commission Act.

10. Whether the Commission has the power to introduce in evidence over the objections of petitioner certain correspondence and documents, procured in its investigation of the files of other respondents before the Commission, and then refuse, upon the demand of petitioner, to produce other correspondence and documents pertaining to the same matters which were obtained by it from the files of such other respondents at the same time in the same investigation, and which were not available to petitioner from any other source, and whether such refusal deprived petitioner of a fair hearing under Section 5(b) of the Federal Trade Commission Act and constituted a denial of due process in violation of the Fifth Amendment to the Constitution of the United States.

Each of the foregoing questions was raised and presented to the Federal Trade Commission, and to the Circuit Court of Appeals.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

The Circuit Court of Appeals in this case has decided an important question of Federal law which has not been but which should be settled by this Court. This question is whether the Federal Trade Commission has jurisdiction and power, under the Federal Trade Commission Act,

(a) To file a complaint alleging and charging the existence and continuance of full and complete understandings, agreements, combinations and conspiracies in restraint of trade in commerce, the elimination of competition and the creation of monopoly, which allegations, if true, would constitute violations of the civil and criminal provisions of the Sherman Act (R. 5, 6, 8);

(b) To hear and determine the existence of full and complete understandings, agreements, combinations and conspiracies in restraint of trade in commerce, resulting in the elimination of competition and the creation of a monopoly constituting violations of the Sherman Act which would require the exercise by this administrative body of complete judicial power which it does not possess (R. 823, 825);

(c) After the determination of the matters set forth in subparagraph (b) above, to then declare by fiat that said matters constitute unfair methods of competition in violation of the Federal Trade Commission Act (R. 825);

(d) Upon said determination and declaration, to then enter an order in complete injunctive form restraining petitioner and other respondents before the Commission from carrying out said agreements, understandings, combinations and conspiracies, and from doing in furtherance thereof any of the acts and

things specified in said order (R. 827, 828, 829, 1016, 1017, 1018);

(e) To exercise the jurisdiction and power to restrain full, complete and existing violations of the Sherman Act which vests exclusive jurisdiction and power in the district courts to enjoin such violations of said Act (R. 827, 828, 829, 1016, 1017, 1018).

This vitally important question, going to the very foundation of the jurisdiction and power of the Federal Trade Commission in a case of this character, has never been presented to or decided by this Court in any prior case.

II.

The Circuit Court in this case has decided a Federal question in a way probably in conflict with applicable decisions of this Court, to-wit:

(a) The decision of the Circuit Court, that

> "Our conclusion is that instead of its being a ground for denying jurisdiction of the F.T.C., the fact that the acts complained of, violate the criminal section of the Sherman Anti-Trust Act, affords a legitimate basis of action by the said Commission"

appears to be in conflict with the decisions of this Court in the following cases, which hold that the Commission has no power to enforce the provisions of the Sherman Act, or to determine violations thereof:

Federal Trade Commission v. *Eastman Kodak Company*, 274 U. S. 619, 623, 624.

Arrow-Hart & Hegeman v. *Federal Trade Commission*, 291 U. S. 587, 599.

Thatcher Mfg. Co. v. *Federal Trade Commission*, 272 U. S. 554, 556, 561.

Federal Trade Commission v. *Raladam*, 283 U. S. 643, 647, 654.

(b) The decision of the Circuit Court appears to be in conflict with the decisions of this Court in the following cases, which hold that the Federal Trade Commission is only an administrative agency and that it and similar administrative bodies are not possessed of Federal judicial power:

Federal Trade Commission v. *Eastman Kodak Company*, 274 U. S. 619, 623, 624.

Union Bridge Co. v. *United States*, 204 U. S. 364, 386, 387.

Monongahela Bridge Co. v. *United States*, 216 U. S. 177, 190, 192.

Interstate Commerce Commission v. *Northern Pacific Railway Company*, 222 U. S. 541, 547, 548.

Interstate Commerce Commission v. *Louisville & Nashville Railroad Co.*, 227 U. S. 88, 90, 93.

(c) The decision of the Circuit Court appears to be in conflict with the following decisions of this Court, which hold that neither the Federal Trade Commission, nor any other administrative agency, has the power to enforce laws the administration of which is specially confided to another governmental agency, or to a court, or to determine violations of such other laws:

Brougham v. *Blanton Mfg. Co.*, 249 U. S. 495, 499, 500.

Federal Trade Commission v. *Raladam Co.*, 283 U. S. 643, 649.

Keogh v. *Chicago & Northwestern Railroad Company*, 260 U. S. 156, 162.

(d) The decision of the Circuit Court appears to be in conflict with the decisions of this Court in the following cases, which hold that the Commission should move before

the agreements, understandings, combinations, conspiracies, restraints or monopolies are completed:

Fashion Guild v. *Federal Trade Commission*, 312 U. S. 457, 464.

Federal Trade Commission v. *Raladam*, 283 U. S. 643, 645, 647, 655.

Federal Trade Commission v. *Raladam*, 316 U. S. 149.

Arrow-Hart & Hegeman Electric Co. v. *Federal Trade Commission*, 291 U. S. 587, 599.

III.

The Circuit Court in this case has decided a Federal question in a way probably in conflict with applicable decisions of this Court. The Circuit Court decided that:

> "Hardly worthy of serious or extended consideration is petitioners' urge that the order should be set aside because no competitor was hurt by the practices and agreements. To carry this contention to its logical conclusion would necessitate denial to the Commission of jurisdiction to deal with any price fixing agreement to which all in the industry have subscribed. In other words, if this contention were accepted, it would only be when one or more competitors are left out or refuse to subscribe to the price-fixing agreement that the Federal Trade Commission could intervene. This would defeat the purpose of the Act. Price fixing usually results in price raising. That, and the elimination of price cutting, are the objects of such agreements. It is not often that any competitor in the industry is hurt by an agreement which raises the prices or an agreement which prevented the cutting of prices. The ordinary and necessary result would be financial advantage, at least temporary advantage to all in the industry. But it would not be to the advantage of the public or to the users of the commodities whose prices are fixed.

> "'Unfair methods of competition' are not determined by so narrow or one-sided a test. It is the harm, which results from destroying the '*fair opportunity*' for competition among competitors which results from a price fixing agreement, created and established by such combination, that makes the action unfair as that term is used in the Act. It is the restriction on the play of competition under normal conditions that presents a case of 'unfair method of competition.' (*F. T. C.* v. *Pacific Paper Assn.*, 273 U. S. 52; *Cal. Rice Industry* v. *F. T. C.*, 102 F. 2d 716, 722.)" (Appendix, p. 7.)

In so holding, the Circuit Court has decided a Federal question in conflict with the following applicable decisions of this Court:

Federal Trade Commission v. *Raladam*, 283 U. S. 643, 645, 647, 654.

Federal Trade Commission v. *Raladam*, 316 U. S. 149.

IV.

The Circuit Court in this case has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

The Circuit Court, by its decision condemning open price filing and the rules of fair competition and particularly Sub-section 3.1 of Section 3 of Article II of Exhibit 11-A, which follows the statement "The practices described below are declared to be unfair and destructive to industry welfare":

> "3.1. Sell, or offer to sell, directly or indirectly, any product of the Section on which price information had been published, at less than the lowest net price published by any member on such product or products; nor sell, or offer to sell, products which are not covered by such price lists but which are similar to listed

products, at net prices more favorable to the purchaser than the lowest published net price'." (Stip. Par. 31, R. 143.)

and in holding that the same was contrary to the provisions of the Sherman Act (Appendix, p. 9), is in conflict with the decision of this Court in *Sugar Institute* v. *United States*, 297 U. S. 553, and especially that part of the opinion appearing on page 601.*

V.

That the Circuit Court of Appeals has so far sanctioned the departure from the accepted and usual course of judicial proceedings by the Federal Trade Commission in depriving petitioner of a full hearing as required by Section 5 of the Federal Trade Commission Act as to call for an exercise of this Court's power of supervision.

At the hearing before the Commission, it called as a witness Donald R. McDonald, who was an examining agent in its employ, and his testimony given on direct as well as in cross-examination appears in the record on pages 449 to 466, inclusive.

Exhibit 155 (R. 452), Exhibit 156 (R. 454), Exhibit 157 (R. 455), Exhibit 158 (Rec. 455), and Exhibit 159 (Rec. 455, 456) identified by said witness, were received in evidence over the objection of petitioner. The letters and

* In the opinion of the Circuit Court (Appendix, p. 9) the Court purports to quote the language of the "Rules of Fair Competition" as follows:

"Sell, or offer to sell, products on which price information has been filed and published at less than the lowest net price filed and published by any member on such product or products; nor sell, or offer to sell, special products which are not covered by his filed and published price list, at net prices more favorable to the purchaser than the lowest filed and published net price of a similar item of comparable grade."

The foregoing language quoted by the Court is in fact the proposed section 4.1 of Article II of the proposed code, Exhibit 8, for the entire industry and as modified by the same section in Exhibit 9. The provision so quoted was never adopted but was only a suggestion, and this fact is conceded by the Commission at page 29 of its brief in the Circuit Court of Appeals.

documents covered by these exhibit numbers were copies of originals which could not be found or produced (Statement by Thomerson, attorney for the Commission, R. 456). The witness stated (R. 458) that in examining the files of such other respondents they undertook to obtain such information as might show the violation of any of the provisions of the Federal Trade Commission Act; *and in addition thereto, such information or documents as might show no violation.*

He further testified that he obtained copies of other letters and documents from the files in question that bore on the nature of the investigation that were then in the possession of the Commission (R. 458, 459).

Upon petitioner's request that the Commission produce such other correspondence obtained by said agent, its production was refused by the attorney for the Commission, petitioner's motion therefor overruled, and its motion to strike said exhibits was likewise overruled (R. 457, 459, 460, 462).

Petitioner before the Commission contended that the Commission's refusal to furnish such additional correspondence and documents from the files of the Commission and which was the only source from which they could be obtained, as the originals of said letters and documents had been lost or destroyed (*Post*, R. 298, 313, 314, 315; Thomerson, R. 456), and the overruling of said motion to produce as well as its motion to strike said exhibits from the record deprived petitioner of the full and complete hearing required by Section 5 of the Federal Trade Commission Act (R. 97-102).

The same contentions were made before the Circuit Court of Appeals (R. 842), coupled with the additional contention that deprivation of said hearing as contemplated by said section of the statute denied the petitioner due process

of law, in violation of the Fifth Amendment to the Constitution of the United States (Brief Point IX, pp. 57, 93, 94, 95).

The Circuit Court of Appeals did not pass upon the question so presented to it, and thus sanctioned the action of the Commission. The refusal of said Court to pass upon said question appears to be in conflict with the decisions of this Court in *Interstate Commerce Commission* v. *Louisville & Nashville Railroad*, 227 U. S. 88, 90, 91, 92, 93; *Morgan* v. *United States*, 298 U. S. 468, 479, 480; *Morgan* v. *United States*, 304 U. S. 1, 18, 19.

Said action of the Circuit Court of Appeals in refusing to pass upon the above question presented to it is in conflict with the decision in *Powhattan Mining Company, et al.* v. *Ickes*, 118 Fed. (2d) 108, 109.

VI.

The Circuit Court of Appeals in this case has rendered a decision in conflict with the decisions of other Circuit Courts of Appeal on the same matter,

(a) The decision of said Court that

> "our conclusion is that instead of its being a ground for denying jurisdiction of the F. T. C., the fact that the acts complained of, violate the criminal section of the Sherman Anti-Trust Act, affords the legitimate basis of action by the said Commission." (Appendix, p. 7.)

appears to be in conflict with the decisions of circuit courts of appeal in other circuits cited below, which hold that the Commission is merely an administrative body without judicial power, not a court, and has no jurisdiction or power to enforce the provisions of the Sherman Act or to determine violations thereof:

Butterick Pub. Co., et al. v. *Federal Trade Commission* (2nd Cir.), 85 Fed. (2d) 522, 525, 526.

American Tobacco Company v. *Federal Trade Commission* (2nd Cir.), 9 Fed. (2d) 570, 586.
Eastman Kodak Co., et al. v. *Federal Trade Commission* (2nd Cir.), 7 Fed. (2d) 594, 595, 596.

(b) The decision of said Court appears to be in conflict with the decisions of circuit courts of appeal in other circuits covering the same matter, cited below, which hold that the Federal Trade Commission does not have the jurisdiction or power to enforce laws the administration of which is specially confided to some other governmental agency or to a court, or to determine violations of such other laws:

United Corporation v. *Federal Trade Commission*, (4th Cir.) 110 Fed. (2d) 473, 475.
Chamber of Commerce v. *Federal Trade Commission*, (8th Cir.) 13 Fed. (2d) 673, 685.

(c) The failure of this Court to pass upon the refusal of the Commission to produce and make a part of the record the additional correspondence and documents obtained by its agent McDonald and delivered to the Commission and then in its possession, on the ground that the same were confidential (R. 459), appears to be in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Powhatan Mining Co., et al.* v. *Harold Ickes*, reported in 118 Fed. (2d) 105, 108, 109, which holds that the failure and refusal of the Bituminous Coal Commission or its subordinates to produce at the hearing before it and make a part of the record pertinent data in its possession based on confidential information received by it, did not accord a full hearing as required by the statute, and constituted lack of due process.

(d) The action of said Court as outlined in sub-paragraph (c) above is in conflict with the decision of the Cir-

cuit Court of Appeals for the Ninth Circuit in *California Lumberman's Council* v. *Federal Trade Commission,* 103 Fed. (2d) 304, 305, which holds that if petitioners have been deprived of a fair trial the order of the Commission is invalid as violative of due process.

WHEREFORE, the petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and send up to this Court, on a day to be designated therein, a full and complete transcript of the record and of all proceedings in the Circuit Court of Appeals had in this case, including the original exhibits filed before the Commission, to the end that this case may be reviewed and determined by this Court; that the decision of said Circuit Court of Appeals and the decree of said Court of May 22, 1944 be reversed, and the complaint of the Federal Trade Commission dismissed; and that your petitioner may be granted such other and further relief as may seem proper.

Respectfully submitted,

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